IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1336

JAMES TRAVIS BUCKLEY, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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February 26, 1979

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IN THE
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October Term, 1978

No._____

JAMES TRAVIS BUCKLEY, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner James Travis Buckley respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 18, 1978.

OPINION BELOW

The opinion of the Court of Appeals appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Mississippi.

JURISDICTION

The judgment of the Court of Appeals

for the Fifth Circuit was entered on December 18, 1978. A timely petition for rehearing en banc and a timely petition for a panel rehearing were both denied on January 29, 1979, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Rule 22(2).

QUESTIONS PRESENTED

1. Whether the failure to file an income tax return, a misdemeanor under 26 U.S.C.A. (IRC 1954) Section 7203, can be an affirmative act required in order to prove income tax evasion under 26 U.S.C.A. (IRC 1954) Section 7201.

2. Whether so-called affirmative acts which are not crimes within themselves, such as dealing in cash or negligence in keeping records must always be considered in the light most favorable to the government, and if so, whether this denies a defendant due process of law by presuming willfulness beyond a reasonable doubt to establish income tax evasion, in the absence of proof and showing by the government of bad faith or evil motive.

3. Whether due process of law is

denied where a defendant is improperly convicted of overlapping felony and misdemeanor income tax charges for the same year, where separate convictions and sentences cannot be supported, and where the defendant is denied a new trial with the benefit of a lessor-offense instruction and a recognition by the trial court that such conviction and sentencing is improper.

4. Whether a defendant in an income tax case is deprived of due process of law if he is denied discovery of F.B.I. investigation files when the tax investigation is started by information furnished to the Treasury Department by the F.B.I.

5. Whether the defense of fear of entrapment as a reason for filing income tax returns should be considered by the jury as a defense.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5:

Section 552a. Records Maintained on Individuals.

No agency shall disclose any record which is contained in a system of records by any means of communication to any

person, or to another agency, ...

Section 552(b)(7). Open Meetings.

Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided . . . every portion of every meeting of an agency shall be open to public observation. Except . . . where the agency properly determines that such portion or portions of its meetings or the disclosure of such information is likely to . . . disclose investigatory records compiled for law enforcement purposes. . .

United States Code, Title 26:

Section 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat income tax imposed by this Title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than five years, or both, together with the cost of prosecution.

Section 7203. Willful Failure to File Return, Supply Information, or

Pay Tax.

Any person required under this Title to pay any estimated tax or tax, or required by this Title, or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than one year, or both, together with the cost of prosecution.

STATEMENT OF THE CASE

Petitioner James Travis Buckley, an attorney, was charged in an eight-count indictment with violating two sections of the Internal Revenue Code of 1954. The indictment charged Buckley with three counts of attempted tax evasion under 26 U.S.C.A.Section 7201 and five counts for failure to file a return under 26 U.S.C.A. Section 7203, all

allegedly occurring during a five year period from 1970 through 1974.

The petitioner admitted at the opening of the trial that he had failed to file income tax returns for the years 1970 - 1974 and to pay a tax for any such years, but defended his failure to file returns on the basis of his fear of entrapment by the F.B.I. and the Internal Revenue Service if he had filed such returns, the petitioner contending he had been subjected to constant surveillance, observation and harrassment by the F.B.I. due to his having defended several alleged members of the Ku Klux Klan in a murder trial. The evidence during six days of trial was directed principally towards establishing the exact amount of the tax and the manner of receiving and handling income and accounting, which the government contended showed a willful intent to evade and defeat tax. The government contended that the basis for the felony charges rested solely on the petitioner's concealing or attempting to conceal income from all proper and lawful officers of the United States. The petitioner's testimony related to good character and

reputation as a competent attorney, his alleged harrassment by the F.B.I. at the times the returns became due, and a lack of willfulness in his defaults, chiefly because of his fear of prosecution on felony tax charges which he felt would have been pushed by the F.B.I. had he filed income tax returns. He also contended he was entitled to discovery of F.B.I. investigative files concerning him for use in his defense, since a letter was sent from the F.B.I. to the Internal Revenue Service which triggered an investigation of his income tax case.

Following a six day trial in the United States District Court for the Southern District of Mississippi, the jury, after two hours of deliberation, returned a verdict of guilty on each of the eight-counts of the indictment.

On appeal, Buckley challenged, inter alia the validity of his convictions for failure to file in the years in which he was also convicted for attempted tax evasion. The Court agreed with the petitioner on this point, but modified the decision below by vacating the convictions and sentences for failure to file in the years 1970, 1973, and

1974, all being misdemeanor counts; otherwise, the Court affirmed the remaining convictions and rejected his arguments concerning a right of discovery and entrapment.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE PROPER INTERPRETATION OF 26 U.S.C. SECTION 7201.

Section 7201 of Title 26 makes income tax evasion a felony. Section 7203 of Title 26 provides that failure to file income tax returns is a misdemeanor. This indicates that Congress did not intend for a person who fails to file income tax returns to be punished for a felony. And yet, this is the position that the petitioner finds himself in in the present case. The Court below agreed with the petitioner that failure to file is an offense improperly brought under Section 7203 as a misdemeanor. However, in paragraph (14,15) of its Decision, the Court stated as follows:

"Where one of the affirmative acts of evasion relied upon by

the government in proving attempted tax evasion under Section 7201 is the failure to file an income tax return . . . "

This clearly indicates that the Court below considered failure to file to be the required affirmative act to also constitute income tax evasion. This is directly contrary to the Decision rendered by this Court in Spies v. United States of America, 317 U.S. 492 (1943) since it would automatically make failure to file income tax returns both a felony and a misdemeanor if the government chooses to bring charges for both. The lessor-offense would always support the felony conviction under such an interpretation of what properly constitutes an affirmative act. This Court stated in Spies that the difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. The Court further held that an affirmative act must be one that could be construed as an attempt to willfully mislead or to conceal for purposes of tax evasion,

while willful but passive neglect of a statutory duty may only constitute the lessor offense (a misdemeanor). The closest that the government could come to anyting it could call an affirmative act in the petitioner's case was negligence in keeping records, the statement of a former close friend turned enemy by a lawsuit that the petitioner allegedly stated that he did not intend to pay tax, and the fact that some of his clients paid him in cash. However, the government completely failed to show any evidence of bad motive or evil intent or intent to evade income taxes, and admitted that none of the above acts were unlawful within themselves. This is in direct conflict with the illustrations set forth in Spies as to what an affirmative act would probably consist of, such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books and records, etc.

At any rate, no where can it be found in any cases that hold that a failure to file income tax returns constitutes a sufficient affirmative act as held by the Court below. It was

error for the Court below to allow the case to go to the jury in this manner. Apparently the jury did not understand the distinctions or it would not have brought convictions that were improper. Further, it was error for the Court of Appeals to throw out the misdemeanor charges after agreeing that the overlapping confictions were improper, since due process of law calls for either throwing out the felony conviction and letting the misdemeanor convictions for failure to file stand, or in remanding the case to the District Court for retrial.

This Court stated in Spies that a defendant is entitled to a charge which will point out the necessity for an inference of willful attempt to defeat or evade tax from some proof in the case other than that necessary to make out the misdemeanors, and that if the evidence fails to afford such an inference, the defendant should be acquited. While a lessor-offense instruction may not have been specifically requested at the trial in the exact words of the usual lessor-offense instruction, Spies requires that a defendant

is entitled to a lessor-offense instruction, and this Honorable Court can deal with this under the standards of plain error rule found in F.R.Crim.Pro. 52(b).

The Decision of the Court of Appeals that alleged affirmative acts must always be construed in the light most favorable to the government in an income tax evasion case under 26 U.S.C. Section 7201 has the practical effect of precluding the jury from being able to conclude that a reasonable doubt exists as to the willfulness tests required by Spies, Supra, as well as in U.S. vs. Murdock, 290 U.S. 389, U.S. vs. Bishop, 412 U.S. 346, and Sansone vs. U.S., 380 U.S. 343. If a jury is told that it must consider inferences in the light most favorable to the government, an otherwise innocent act can be called an affirmative act and the government has then met its burden of proof to support a felony charge in a case of this nature. The affirmative acts should be such that evil motive or bad faith is obvious before they should be construed in the light most favorable to the government

in an income tax evasion case. The Decision of the Court below does not require a lessor-offense instruction in an income tax case charging both failure to file and income tax evasion, although Spies specifically holds in the last two paragraphs that there must be a Court charge to point out to the jury the distinction between the necessary elements of tax felonies and tax misdemeanors.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING FAILURE TO FILE INCOME TAX CASES.

It is significant that each year thousands of taxpayers either file their income tax returns late or do not file at all until they receive notification from the Internal Revenue Service that a return has not been received. Considering this, it is interesting to look back over the reported income tax cases where a defendant was convicted on income tax evasion charges, and to note the number of such cases which also included convictions for failure to file income tax returns. Out of hundreds of evasion convictions, the cases can be

counted on one hand that also include failure to file, and a review of these few cases show very extreme circumstances, but there is not a single one of these cases where failure to file was used as the affirmative act necessary to support the evasion charges.

If this Decision stands, it establishes a very dangerous precedent for use in all future cases that involve charges of both failure to file returns and income tax evasion. As previously eluded to, this was not intended by Congress, and a careful reading of Spies clearly shows that this Court likewise did not intend such a situation.

3. THE DECISION BELOW RAISES THE SIGNIFICANT AND RECURRING PROBLEMS CONCERNING FREEDOM OF INFORMATION.

The Decision of the Court of Appeals holding that F.B.I. investigation records are not subject to discovery by an income tax defendant is in conflict with the Decision of the Court of Appeals for the 9th Circuit in U.S. vs. Brown, 562 F.2d 1144, with Meade Data Central, Inc. vs. U.S. Department of Air Force, 566 F.2d 242, and with the Decision of

the Court of Appeals for the 9th Circuit in U.S. Vs. Oaks, 508 F.2d 1403. The question of whether or not petitioner was entitled to certain documents contained in F.B.I. files and requested under 5 U.S.C. 552(a) is a novel question in many respects and one not previously presented to this Court in its present context. The documents were not exempted from disclosure under 5 U.S.C. 552(b)(7) as claimed by the government. There was no risk to the national security involved, nor would the investigative processes of the F.B.I. be disrupted by the disclosure. Since the F.B.I. sent a letter to the Internal Revenue Service notifying them that the petitioner had received a substantial legal fee which might be of interest to them, it is not unreasonable to allow the petitioner discovery as to the information contained in the government files, since it certainly played a substantial role in his being charged with a tax offense. It should further be noted in this connection that the petitioner had been trying to secure these files for several months prior to indictment in his case and that no factual reason was ever given for failing

to disclose the materials and no specific exemption was ever claimed to justify the failure to disclose the additional documents.

Also, it should be pointed out that the petitioner claimed harrassment by the agency from which the documents were sought, and that the agency had fostered and promoted the prosecution of his case. If this could be shown by the documents sought or if the documents sought could lead to evidence tending to support that assertion, the petitioner would have been able to defend the case on the basis of discriminatory prosecution. U.S. vs. Oaks, 508 F.2d. 1403 (9th Cir. 1974); U.S. vs. Bourque, 541 F.2d 290, (1st Cir. 1976).

4. THE DECISION BELOW VIOLATES DUE PROCESS OF LAW BY REFUSING JURY INSTRUCTIONS AS TO ENTRAPMENT.

The 5th Circuit's Opinion in this case reflects important statutory and policy considerations growing out of petitioner's contention that he was entrapped and that this was a valid defense for failure to file income tax returns. The Opinion held that the

entrapment Decision is in conflict with the 5th Circuit's own Decision in U.S. vs. Benavidez, 558 F.2d 308, a Decision which quotes the rule in Notaro vs. U.S., 363 F.2d 169 (9th Cir. 1966). Certainly entrapment existed in the mind of the petitioner. But in the present instance, the question is was the conduct of the F.B.I. towards the petitioner such as to cause him to be in apprehension, and his testimony alone should have been adequate in order to allow the jury to be charged on the question of entrapment.

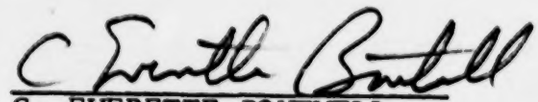
CONCLUSION

Finally, the correctness of the Decision below is open to serious question. The jury improperly convicted the petitioner for overlapping offenses contrary to law, and the trial judge erred both in allowing the case to go to the jury for consideration on both felony and misdemeanor charges and in imposing sentences for both felony and misdemeanor charges. The 5th Circuit recognized this to some extent by throwing out the misdemeanor convictions,

but its refusal to throw out the felony convictions instead or to order a new trial cannot be justified.

For all of the above reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the 5th Circuit.

Respectfully submitted,



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UNITED STATES of America,
Plaintiff-Appellee,

v.

James Travis BUCKLEY,
Defendant-Appellant.

No. 77-5449.

United States Court of Appeals,
Fifth Circuit.

Dec. 18, 1978.

Defendant was convicted before the United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., J., of attempted tax evasion and failure to file a return, and he appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) defendant was not entitled to entrapment instruction where criminal intent did not originate with the Government but formed within defendant's own mind, in response to alleged plot by government agency to see him incarcerated; (2) even if defendant's Sixth Amendment rights were in-

fringed by allowing prosecution witness to invoke attorney-client privilege to prevent his three attorneys from testifying, defendant was not prejudiced where subject information was elicited from other sources; (3) as regards same tax years, offense of failure to file was a lesser included offense in attempted tax evasion, and (4) defendant was not entitled to discovery of FBI investigative files.

Affirmed in part; modified in part.

1. Criminal Law - 739.1(1)

Issue of entrapment is for jury, assuming it is properly raised.

2. Criminal Law - 330

Defendant has initial burden of going forward with evidence on entrapment defense and must produce some evidence, but more than a scintilla, raising the defense.

3. Criminal Law - 569

Once defendant has met his burden of going forward with evidence on entrapment defense the prosecution must ultimately prove beyond a reasonable doubt that defendant was not entrapped.

4. Criminal Law - 339

If defendant fails to carry his burden of going forward with evidence on entrapment defense, he is not entitled to have jury consider such defense.

5. Criminal Law - 37(6)

Defendant was not entrapped into committing offenses of attempted tax evasion and failure to file where the criminal intent did not originate with the Government but, instead, formed within defendant's own mind, in response to alleged plot by government agency to see him incarcerated. 26 U.S.C.A. (I.R.C. 1954) Sections 7201, 7203.

6. Witnesses - 198(1)

Purpose of attorney-client privilege is to encourage free-flowing communication and candid disclosure so vitally necessary to effective representation by counsel.

7. Witnesses - 198(1)

Invocation of attorney-client privilege does not depend on a showing of "good faith" or "proper motive."

8. Witnesses - 198(1)

Where testimony sought to be elicited was properly within scope of attorney-client privilege, client was entitled to invoke such privilege notwithstanding that he sought to do so because it would have been inconvenient for counsel to testify rather than because of a specific concern for confidentiality.

9. Criminal Law - 1170(2)

Even if client's Sixth Amendment rights were infringed when prosecution

witness invoked attorney-client privilege and prevented his three attorneys from testifying defendant was not prejudiced where he was able to otherwise place before jury the very same evidence sought to be adduced from the witness and his attorneys. U.S.C.A.Const.Amend.6.

10. Internal Revenue - 2408

To sustain a conviction for attempted tax evasion the Government must prove existence of a tax deficiency, an affirmative act constituting an evasion or attempted evasion of the tax, and willfulness. 26 U.S.C.A. (I.R.C.1954) Section 7201.

11. Internal Revenue - 2406

Elements of offense of failure to file a tax return are proof of failure to file and willfulness in doing so. 26 U.S.C.A. (I.R.C.1954) Section 7203.

12. Internal Revenue - 2406, 2408

"Willfulness" within meaning of statutes defining offenses of failure to file a tax return and attempted tax evasion means the intentional violation of a known legal duty. 26 U.S.C.A. (I.R.C.1954) Sections 7201, 7203.

See publication Words and Phrases for other judicial constructions and definitions.

13. Federal Courts - 800

In reviewing sufficiency of the evidence claimed, the Court of Appeals must view the trial evidence in the light most favorable to the Government, as it does not have the license to weigh the evidence or assess the credibility of the witnesses.

14. Indictment and Information - 191

Where one of the affirmative acts of evasion relied on by the Government in proving attempted tax evasion is failure

to file income tax return, failure to file is a lesser included offense. 26 U.S.C.A. (I.R.C.1954) Sections 7201, 7203.

15. Criminal Law - 199, 1184(4)

Where charges of attempted tax evasion and failure to file return involved the same tax years, the latter was a lesser included offense of the former and defendant could not be punished for both but only for the greater and, hence, conviction and sentence for the lesser offense were required to be vacated. 26 U.S.C.A. (I.R.C.1954) Sections 7201, 7203.

16. Criminal Law - 199, 1184(4)

Where one offense is included in another, they cannot support a separate conviction and sentence and, thus, where defendant is improperly convicted for a lesser included offense the proper remedy is to vacate both the conviction and sentence on the included offense, leaving

the conviction of sentence on the greater offense intact.

17. Criminal Law - 1181

Where it was obvious that improper convictions for lesser included offenses did not lead trial court to impose a harsher sentence for the greater offense than he would have in the absence of such convictions, remand for resentencing was not required.

18. Criminal Law - 627.8(4)

Requiring material sought for discovery to be submitted to the court for an in camera inspection is a practice which is both reasonable and protective of defendant's rights, especially where request involves material the disclosure of which is arguably not in the public interest.

19. Records - 14

Federal Bureau of Investigation files concerning criminal defendant were exempt

from disclosure under Freedom of Information Act. 5 U.S.C.A. Section 552(b)(7).

20. Criminal Law - 627.8(1)

It is incumbent on defendant to make a prima facie showing of materials in order to obtain discovery. Fed. Rules Crim. Proc. rule 16(a)(1)(C), 18 U.S.C.A.

21. Records - 14

Although Freedom of Information Act provides an independent basis for obtaining information potentially useful in a criminal trial, it was not intended as a device to delay ongoing litigation or enlarge scope of discovery beyond that already provided by Federal Rules of Criminal Procedure. 5 U.S.C.A. Section 552(a); Fed. Rules Crim. Proc. rule 16(a)(1)(C), 18 U.S.C.A.

Appeal from the United States District Court for the Southern District of Mississippi.

Before RONEY, TJOFLAT and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Appellant James Travis Buckley, an attorney, was charged in an eight-count indictment with violating two sections of the Internal Revenue Code of 1954. The indictment charged Buckley with three counts of attempted tax evasion under 26 U.S.C.A. Section 7201 and five counts for failure to file a return under 26 U.S.C.A. Section 7203, all allegedly occurring during a five-year period from 1970 through 1974. Following a six-day trial in the United States District Court for the Southern District of Mississippi, the jury, after two hours of deliberation, returned a verdict of guilty on each of the eight counts of the indictment. On appeal Buckley challenges, inter alia, the validity of his convictions for failure to file in the years in which he was also

convicted for attempted tax evasion. Because we agree with appellant on this point, we modify the decision below by vacating the convictions and sentences for failure to file in 1970, 1973 and 1974; otherwise, we affirm.

I. Entrapment

Buckley raised an "entrapment" defense at trial consisting of testimony by him and his friends to the effect that the F.B.I. was engaged in a plot to see him "behind bars." Buckley asserted that he had incurred the ire of the F.B.I. by representing several of the criminal defendants in a trial arising out of the fire bombing death of Vernon Dahmer, the Hattiesburg, Mississippi, civil rights leader, and by his representation of numerous other defendants in cases where he had had occasion to cross-examine F.B.I. agents. Appellant's friends testified that they had overheard remarks

made by F.B.I. agents to Buckley stating that "we will get you one way or the other." Buckley himself testified that an I.R.S. agent had visited him in 1966 in connection with an audit of his return and warned him that the F.B.I. was "out to get him" regardless of whether he filed or not. Numerous acts of harassment were also alleged. As a result of his conversation with the I.R.S. agent and his experiences with the F.B.I., Buckley testified that he failed to file income tax returns because he was afraid that if he were to file he would be indicted with fabricated charges of filing fraudulent returns, a felony.[1] Choosing the lesser of two evils, then, he elected

1. Although Buckley's testimony relating to his entrapment defense at trial consisted solely of his statement that he was "afraid" to file a return, the reasonable inference to be drawn from that testimony and the arguments in his brief is that he did not file during the years in question because he was afraid that the F.B.I. would fabricate information to charge him with filing fraudulent returns, should he choose to file.

not to file, knowing it to be punishable only as a misdemeanor. Arguing that the above evidence was sufficient to raise the issue of entrapment, appellant now contends that the trial court erred in refusing to instruct the jury on the defense of entrapment.

[1-4] Appellant is certainly correct in asserting that the issue of entrapment is for the jury to decide, assuming it is properly raised. United States v. Benavidez, 558 F.2d 308, 310 (5th Cir. 1977); United States v. Harrell, 436 F.2d 606, 612 (5th Cir. 1970); Pierce

v. United States, 414 F.2d 163 (5th Cir.), cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969). Nonetheless, in order to raise the issue, the initial burden of going forward with the evidence lies with the defendant; he must produce "some evidence, but more than a scintilla," raising the defense. United States v. Groessel, 440 F.2d 602, 606 (5th Cir.), cert. denied, 403 U.S. 933, 91 S.Ct 2263, 29 L.Ed.2d 713 (1971). See also United States v. Benavidez, 558 F.2d 308 (5th Cir. 1977); United States v. Harper, 505 F.2d 924 (5th Cir. 1974). Once the defendant has discharged this obligation, the prosecution must ultimately prove beyond a reasonable doubt that the defendant was not entrapped into committing the offense. United States v. Benavidez, 558 F.2d 308, 310 (5th Cir. 1977); United States v. Harrell, 436 F.2d 606, 612 (5th Cir. 1970). If the

defendant fails to carry his burden of going forward with the evidence, however, he is not entitled to have the jury consider the defense of entrapment. United States v. Harper, 505 F.2d 924, 926 (5th Cir. 1974); United States v. Groessel, 440 F.2d 602, 606 (5th Cir.), cert. denied, 403 U.S. 933, 91 S.Ct. 2263, 29 L.Ed.2d 713 (1971).

Entrapment occurs "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." Sorrells v. United States, 287 U.S. 435, 442, 53 S.Ct. 210, 213, 77 L.Ed. 413 (1932). See also United States v. Russell, 411 U.S. 423, 434-35, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); Sherman v. United States, 356 U. S. 369, 372, 78 S.Ct. 819, 2 L.Ed.2d

848 (1958); United States v. Costello, 483 F.2d 1366, 1367 (5th Cir. 1973); United States v. Groessel, 440 F.2d 602, 605 (5th Cir.), cert. denied, 403 U.S. 933, 91 S.Ct. 2263, 29 L.Ed.2d 713 (1971). Although Buckley's story was vigorously denied by the government at trial,[2] we nonetheless accept it as true for the purposes of deciding this issue. And even assuming Buckley's allegations to be true, the evidence does not raise the defense of entrapment.

2. The government adduced evidence at trial indicating that Buckley's returns were never audited in 1966, thus casting doubt on his assertion that he was visited by an Internal Revenue Agent. The government also presented evidence to the effect that the F.B.I. had forwarded

information concerning Buckley to Internal Revenue simply as a routine part of their investigation into a threat on Richard Castle's life. The F.B.I. claimed that this was the only connection that they had had with the Buckley case.

[5] It is clear from the evidence that the criminal intent did not originate with the government, but instead formed within the defendant's own mind, in response to an alleged plot by the F.B.I. to see him incarcerated. As Buckley testified:

> In 1966 in my office in Bay Springs, Mississippi an agent of the Internal Revenue visited me and audited my books and papers and accounts and then later came to my house . . . . I don't know the man's name and I

don't know if I knew it then, but there were actually two different ones visited me at different time[s], but one of them told me then and told me at my home later, said, that the Federal Bureau of Investigation is after you and he gave me this and told me it was a friendly advice and a friendly warning, he said, "they will get you one way or the other and I am telling you this as a matter of trying to help you and trying to advise you to be on the alert.' And he said, 'I know them well enough to know that it does not make any difference whether you file or not, if they can get you,' but he said, 'I'm not telling you not to file and I'm not telling you to file, but you know the penalties for not filing,' and he said, 'I'm under an obligation to advise you that the law requires that you file.'

As the testimony thus shows, there was no attempt by any law enforcement official to induce or entreat Buckley to commit the offenses for which he was charged; rather, the decision not to file returns for the years 1970 through 1974 was one conceived entirely by Buckley himself, in response to an alleged threat by the F.B.I. Whether that threat is real or fancied is immaterial to our decision here. The course of action pursued by Buckley was the result of a voluntary and informed decision to violate the law, a far cry from the genuine entrapment situation where an otherwise innocent and law abiding citizen falls prey to government seduction and is persuaded to commit a crime. If Buckley truly believed the F.B.I. was "out to get him," then he should have scrupulously obeyed the law, remaining confident that he would be cleared of

any contrived charges. Because the evidence presented by Buckley failed to raise the defense of entrapment, it was not error for the trial judge to refuse to charge on entrapment.

II. Attorney-Client Privilege

Buckley next asserts that it was error to allow prosecution witness Castle to invoke the attorney-client privilege and prevent his three attorneys from testifying. Richard Castle had been a close friend of Buckley's during the years in question and supplied very damaging testimony enumerating the various affirmative acts of evasion practiced by Buckley. In an effort to impeach Castle's credibility, Buckley sought to call to testify three attorneys who represented Castle in a civil action brought by Buckley to collect attorney's fees. Buckley had represented Castle in a personal injury suit in which a $100,000

settlement had been procured, but the two were unable to agree on Buckley's fee, so Buckley brought an action to recover his portion of the settlement. By way of offer of proof, Buckley disclosed that he intended to show that Castle was biased against him because of their disagreement over the amount of the fee; furthermore, Buckley wished to prove that Castle had lied to his attorneys about the settlement offer he had originally received in the personal injury case before he retained Buckley. Castle invoked the privilege and prevented his attorneys from testifying, asserting that it would be inconvenient for them to have to do so.

[6-8] Appellant concedes that the testimony sought to be elicited from Castle's attorneys was properly within the scope of the attorney-client privilege. Nonetheless, he argues that the privilege may not be invoked solely for rea-

sons of convenience, but must be invoked out of a concern for confidentiality.

While appellant's argument may have some superficial appeal, it fails to appreciate the pragmatic considerations underlying the implementation of the policy behind the attorney-client privilege, which is to encourage the free-flowing communication and candid disclosure so vitally necessary to effective representation by counsel. This policy cannot be achieved unless a client is free to communicate with his attorney "without fear of consequences or the apprehension of disclosure." Modern Woodmen of America v. Watkins, 132 F.2d 352, 354 (5th Cir. 1942). See Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); Baird v. Koerner, 279 F.2d 623, 629 (9th Cir. 1960); Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956); 8 Wigmore

on Evidence Section 2291 (McNaughton rev. 1961). To condition the invocation of the privilege upon a showing that it was claimed out of considerations of confidentiality would subject a client to fear of subsequent disclosure and cause him to question the wisdom of telling all to his attorney. Doubting his ability to prove subsequently that the present confidence entrusted in his attorney is prompted by the assurance that he can later claim the privilege, a client might hesitate to be completely open with his attorney and the policy behind the privilege would be frustrated. Just as we do not question the motives of a litigant who wishes to invoke an exclusionary rule of evidence, we should likewise not question the motives of a client who wishes to invoke the privilege. Predicating the invocation of the privilege upon a showing of "good faith" or

"proper motive" would remove the protective shield of the privilege, and it would cease to act as an inducement to frank and unrestricted communications between attorney and client.

Appellant further contends that Castle's claim of the privilege denied him his Sixth Amendment right to confront witnesses against him and have compulsory process run in his favor. As we have recognized above, there is a valid interest to be served by the existence of the attorney-client privilege. Buckley suggests, however, that the policy behind the privilege is subordinate to his Sixth Amendment rights in this case. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), relied upon by appellant, does stand for the proposition that the Sixth Amendment rights of a criminal defendant may, in some instances, be paramount to certain

governmental interests. In Davis, for example, the state's interest in protecting juvenile offenders, implemented by an evidentiary rule prohibiting the disclosure of their court records in subsequent judicial proceedings, was outweighed by the defendant's right to cross-examine a prosecution witness effectively. Similarly, other decisions by the Supreme Court have resolved the conflict between the Sixth Amendment and various governmental interests in favor of the defendant's Sixth Amendment rights. See, e. g., Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); United States v. Nixon, 418 U.S. 683 (1974).

[9] We need not reach this issue, however, because even assuming arguendo that appellant's Sixth Amendment rights were infringed, we find on the basis of this record that Buckley has

suffered no prejudice. Buckley asserts that his Sixth Amendment rights were violated when he was prevented from questioning Castle and his three attorneys on matters within the scope of the privilege. Buckley wished to prove that Castle was biased against him because of their disagreement over the amount of the fee owed by Castle to Buckley and that Castle had lied to his attorneys about the amount of the settlement offer he had received in the personal injury case before he retained Buckley. A review of the record reveals that Buckley was able to place this very same evidence before the jury. Castle himself readily admitted on cross-examination that he had disagreed with Buckley over the amount of his fee. In addition, Judge George D. Grubbs, who presided over the pre-trial proceedings in Buckley's state court suit against Castle for the fee,

freely testified that Castle had lied to his attorneys concerning the amount of the settlement offered to him. With the essence of the desired testimony before the jury, it is obvious that Buckley was in no way prejudiced by the invocation of the privilege. See United States v. Ashley, 555 F.2d 462, 465 (5th Cir. 1977).

III. Sufficiency of the Evidence

[10-13] Buckley challenges the sufficiency of the evidence to support his convictions under both Section 7201 and Section 7203. To sustain a conviction under Section 7201 the government must prove the existence of a tax deficiency, an affirmative act constituting an evasion or attempted evasion of the tax, and willfulness. Sansone v. United States, 380 U.S. 343, 85 S.Ct . 1004, 13 L.Ed.2d 882 (1965); Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943). The elements of an

offense under Section 7203 involve proof of failure to file and willfulness in doing so. Sansone v. United States, 380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965). Willfulness, within the meaning of both sections, is simply the "intentional violation of a known legal duty." United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct 22, 23, 50 L.Ed.2d (1976)(per curiam). In reviewing the evidence presented at trial, we must view it in a light most favorable to the government, for we do not have the license to weigh the evidence or assess the credibility of witnesses. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); United States v. Burrell, 505 F.2d 904, 907 (5th Cir. 1974). To reverse a conviction on the ground of insufficient evidence we must find that "a reasonably minded jury must have [had] a reasonable doubt as to the

existence of any of the essential elements of the crime charged." United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973). We fail to reach such a conclusion, and from our review of the record, find the evidence more than sufficient.

IV. Validity of the Section 7203 Convictions

Buckley was convicted for attempted evasion of taxes (Section 7201) in 1970, 1973 and 1974. He was convicted for failure to file (Section 7203) in these same years, as well as in 1971 and 1972. As shown by the diagram below, upon the Section 7201 convictions for 1973 and 1974, concurrent one-year prison terms were imposed; for the Section 7203 convictions for 1970, 1971 and 1973, concurrent six-month prison terms were imposed to run consecutively to the one-year terms; finally, Buckley received concurrent suspended sentences for the

Section 7201 count in 1970 and the Section 7203 counts in 1972 and 1974, but with concurrent one-year probation terms to be served upon release from prison.

Section 7201

1970 - Suspended sentence with probation

1971 -

1972 -

1973 - One Year

1974 - One Year

Section 7203

1970 - Six Months

1971 - Six Months

1972 - Sentence suspended with probation

1973 - Six Months

1974 - Sentence suspended with probation

[14,15] Appellant argues, and we agree, that failure to file is a lesser offense included in a Section 7201 conviction based on the facts of this case. The government conceded as much at oral

argument.[3] Where one of the affirmative acts of evasion relied upon by the government in proving attempted tax evasion under Section 7201 is the failure to file an income tax return, failure to file is a lesser included offense, and Congress did not intend for the defendant to be punished for both offenses. United States v. Newman, 468 F.2d 791, 796 (5th Cir. 1972), cert. denied, 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973).

3. Two of the contentions made by the government in their brief were abandoned at oral argument: first, the government conceded that probation was "punishment" for the purposes of the Double Jeopardy Clause's protection against multiple punishments for the same offense; second, the government

conceded that they had misapplied the test of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), for determining whether two offenses were the "same" for double jeopardy purposes, and therefore, that failure to file was a lesser included offense of attempted tax evasion on the facts of this case.

[16] Although the government concedes that punishment may not be imposed under both statutes, it nonetheless argues that the convictions for failure to file should stand for the years 1970, 1973 and 1974, reasoning that a conviction without a sentence imposed thereupon is harmless.[4] We disagree. Where

4. The very fact that the

government strenuously calls for retention of the conviction belies their assertion that it is "harmless".

one offense is included in another, it cannot support a separate conviction and sentence. Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); United States v. York, 578 F.2d 1036, 1040 (5th Cir. 1978). Thus, in situations such as the present one, where a defendant is improperly convicted for a lesser included offense, the proper remedy is to vacate both the conviction and sentence on the included offense, leaving the conviction and sentence on the greater offense intact. United States v. Slutsky, 487 F.2d 832, 845-46 n.18 (2d Cir. 1973), cert. denied, 416 U.S.

937, 94 S.Ct. 1937, 40 L.Ed.2d 287 (1974); United States v. Rosenthal, 454 F.2d 1252, 1255-56 n.2 (2d Cir.), cert. denied, 406 U.S. 931, 92 S.Ct. 1801, 32 L.Ed.2d 134 (1972); United States v. Newman, 468 F.2d 791, 796 (5th Cir. 1972), cert. denied, 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d (1973).

The government emphasizes that in Jeffers the conviction on the lesser included offense was allowed to stand,[5] 432 U.S. at 148, 97 S.Ct. 2207, and urges a similar result here. We find the government's reliance on Jeffers to be misplaced. In Jeffers the Court dealt with the contention by the defendant that 21 U.S.C. Section 846, prohibiting conspiracies to commit drug-

5. In Jeffers v. United States, 432 U.S. 137, 155 n.25, 97 S.Ct 2207, 53 L.Ed.2d 168 (1977), the Court pointed to United States v. Gaddis, 424 U.S. 544, 549 n.12, 96 S.Ct. 1023, 47 L.Ed.2d 222 (1976), as involving a situation where both the conviction and sentence on the lesser included offense were vacated.

related offenses, was a lesser included offense of 21 U.S.C. Section 848, which prohibits conducting a continuing criminal enterprise to violate the drug laws. Arguing that the two offenses were the same for double jeopardy purposes, Jeffers maintained that his trial and conviction for violating 21 U.S.C. Section 848, occurring subsequent to his conviction under 21 U.S.C. Section 846, was invalid because it placed him twice in jeopardy for the same offense

in contravention of the Double Jeopardy Clause of the Fifth Amendment. Assuming arguendo that Section 846 was a lesser included offense, the Court nonetheless concluded that Jeffers had waived his double jeopardy rights by persuading the trial court to order separate trials and by failing to raise any double jeopardy objections at the time. Having concluded that Jeffers could not object to being separately tried and convicted for the two offenses, the Court then turned to the question of whether Congress had intended to allow cumulative punishment for those defendants whose conduct violates both statutes. The Court concluded that Congress did not so intend, and accordingly reduced the fines given Jeffers to the maximum amount allowable under Section 848.

In contrast, we deal here with two offenses, one of which is admittedly

included within the other, and a defendant who is neither responsible for his multiple convictions nor has exhibited any conduct resembling a waiver of his rights. Jeffers could not be heard to complain of successive prosecutions because he had in fact caused them; Buckley, on the other hand, has done nothing to estop him from complaining of his multiple convictions. Jeffers turned on a finding of waiver; we find no waiver in this case.

[17] Therefore, we modify the judgment below by vacating the convictions and sentences for failure to file (counts two, six and eight) in the years 1970, 1973 and 1974. Because it is obvious that the convictions on the Section 7203 counts did not lead the trial court to impose a harsher sentence on the Section 7201 counts than he would have in the absence of such convictions,

there is no need to remand for resentencing. See United States v. Slutsky, 487 F.2d 832, 845-46 n.18 (2d Cir. 1973), cert. denied, 416 U.S. 937, 94 S.Ct. 1937, 40 L.Ed.2d 287 (1974); United States v. Rosenthal, 454 F.2d 1252, 1256 (2d Cir.), cert. denied 406 U.S. 931, 92 S.Ct. 1801, 32 L.Ed.2d 134 (1972).

V. Disclosure of the F.B.I. Files

[18,19] As a final point of error, Buckley argues that the trial court committed reversible error by refusing to order discovery of the F.B.I. investigative files concerning him. Buckley contends that he is entitled to discovery by virtue of the Supreme Court's decision in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in which the Court held that the suppression of exculpatory evidence by the prosecution in response to the request of

an accused violates due process whenever that evidence is material to either guilt or punishment. In response to Buckley's motion for the discovery of these materials, the trial judge ordered the F.B.I. to submit the files to the prosecution for review and to the court for an in camera inspection. Both the prosecution and the trial court concluded that the files contained no exculpatory materials within the meaning of Brady. Having examined these files, sealed by the district court for possible review on appeal, we agree. Requiring materials sought for discovery to be submitted to the court for an in camera inspection is a practice which is both reasonable and protective of the defendant's rights, and, we might add, one which has received a measure of approval by the Supreme Court. See United States v. Agurs, 427 U.S. 97, 106, 96 S.Ct.

2392, 49 L.Ed.2d 342 (1976). Moreover, in areas where, as in the present case, the request involves materials the disclosure of which is arguably not in the public interest,[6] this Court has sanctioned the use of in camera inspections to resolve the conflicting demands of the defendant and the government. United States v. Brown, 539 F.2d 467, 270 (5th Cir. 1976); see also United States v. Johnson, 577 F.2d 1304, 1309-10 (5th Cir. 1978). Thus, we conclude that Buckley's rights were adequately protected by the procedure employed by the district court and we concur in its conclusion that the F.B.I. files contain no information that would have been helpful to Buckley's defense.

6. Aside from the obvious security risks created by the disclosure of the F.B.I. files, such

information is also exempted from disclosure by the Freedom of Information Act. 5 U.S.C.A. Section 552(b)(7).

[20] Buckley also contends that there are two independent statutory provisions which entitle him to the requested information "as a matter of law." The first of these, Fed.R.Crim.P. 16(a)(1)(C), conditions the disclosure of information upon a showing by the defendant that the documents sought are "material to the preparation of his defense." Contrary to Buckley's assertion that Rule 16(a)(1)(C) "mandate[s] the production of such documents upon request," it is incumbent upon a defendant to make a prima facie showing of "materiality" in order to obtain discovery:

> Materiality means more than that the evidence in question bears

> some abstract logical relationship to the issues in the case . . . There must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.

United States v. Ross, 511 F.2d 757, 762-63 (5th Cir.), cert. denied, 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975). Buckley has made no such showing here. Alternatively, even if we were to assume that a showing of materiality had been made, the information sought, by Buckley's own admission, related only to his entrapment defense, which as we have already decided, was not a "defense" in this case.

[21] Similarly, Buckley's reliance on the disclosure provisions of the Freedom of Information Act (FOIA), 5

U.S.C.A. Section 552(a)[7], does not support his claim of entitlement to the files. Although the FOIA provides an independent basis for obtaining information potentially useful in a criminal trial, it "was not intended as a device to delay ongoing litigation or to enlarge the scope of discovery beyond that already provided by the Federal Rules of Criminal Procedure." United States v. Murdock, 548 F.2d 599, 602 (5th Cir. 1977).

VI. Conclusion

We affirm the judgment of the district court but modify it by vacating the convictions and sentences for failure to file in 1970, 1973 and 1974 (counts two, six and eight).

AFFIRMED in part; MODIFIED in part.

7. The F.B.I. files were the subject of a separate civil action

brought by Buckley prior to trial under the Freedom of Information Act.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

January 29, 1979

Edward W. Wadsworth, Clerk
Tel 504-589-6514
600 Camp Street
New Orleans, LA 70130

TO ALL PARTIES LISTED BELOW:

NO. 77-5449 - U.S.A. v.
JAMES TRAVIS BUCKLEY

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate

Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

BY Sally Hayward
Deputy Clerk

cc: Mr. Travis Buckley

Mr. C. Everette Boutwell

Mr. Robert E. Hauberg

Mr. M. Carr Ferguson

Messrs. Gilbert E. Andrews

Robert E. Lindsay

Charles E. Brookhart

Ms. Mary L. Jennings

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

February 7, 1979

Edward W. Wadsworth,
Clerk
600 Camp Street
New Orleans, LA 70130
Telephone 504-589-6514

TO: Mr. Harvey G. Henderson, Clerk
U. S. District Court
P. O. Box 769
Jackson, MS. 39205

NO. 77-5449 - UNITED STATES OF AMERICA V. JAMES TRAVIS BUCKLEY

(Dist. Ct. No. CR J76 54 (N))

Dear Sir:

(XX) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 21 Decision in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I

enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

(XXX) Copy of the Court's opinion.

( ) Original record on appeal or review.) TO BE RETURNED

( ) Original exhibits.) LATER

( ) Bill of Costs approved by this Court.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

BY: Brenda Hauck
Deputy Clerk

Enc. (LETTER ONLY)

cc: Mr. Travis Buckley
Mr. Robert E Hauberg
Mr. M. Carr Ferguson
Mr. C. Everette Boutwell

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FILED
FEB 7 1979
EDWARD W. WADSWORTH
Clerk

NO. 77-5449

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES TRAVIS BUCKLEY,

Defendant-Appellant.

- - - - -

Appeal from the United States District Court for the Southern District of Mississippi

- - - - -

O R D E R:

(✓) The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

James C. Hill
UNITED STATES CIRCUIT JUDGE